IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 11TH OCTOBER 2007 / 19TH ASWINA 1929

SA.No. 398 of 1994

AS.98/1987 OF ADDL.SUB COURT,ATTINGAL
OS.52/1983 OF MUNSIFF'S COURT,VARKALA
.....

APPELLANT/APPELLANT/ADDL. PLAINTIFF

GOPALAN RAMADAS,
KALATHIKKATTU VEEDU,
VAKKOM DESOM, KADAKKAVOOR VILLAGE.

BY ADV. SRI.SIBY MATHEW
SRI.WILSON URMESE

RESPONDENTS/RESPONDENTS/DEFENDANTS:

***1. KOCHAPPI PARAMU, VILAYIL VEEDU,**
VAKKOM DESOM, KADAKKAVOOR VILLAGE. (DIED)

2. KRISHNAN KUTTY MOHANAN,
VILAYIL VEEDU, VAKKOM DESOM,
KADAKKAVOOR VILLAGE.

***3. LEELA, W/O. MOHANAN,**
S.B BHAVAN, NEAR KALATHIKATTU,
VAKKOM, P.O. VARKALA.

***ADDL. R3 IS IMPLEADED AS LEGAL REPRESENTATIVE OF DECEASED IST RESPONDENT AS PER ORDER DATED 13/07/2007 IN IA NO. 1871/2004.**

BY ADV. SRI.P.K.MUHAMMED

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 11/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A.NO. 398 OF 1994

Dated 11th October 2007

J U D G M E N T

Second plaintiff who was impleaded on the death of original plaintiff in O.S.52/1983 before Munsiff court, Varkala is the appellant. Defendants are respondents 1 and 2. On the death of first respondent legal heir was impleaded as third respondent. Suit was filed seeking a decree for declaration of title and possession and for permanent prohibitory injunction restraining respondents 1 and 2 from trespassing into the plaint schedule property and also for a mandatory injunction to restore the demolished compound wall. Plaint B schedule property is part of plaint A schedule property. Case of plaintiff was that plaint A schedule property belong to him under Ext.A3 partition deed and Ext.A2 release deed and Ext.A4 sale deed and respondents have no manner of right or possession over the same. It was contended that first respondent is the owner of the property which lies to the west of plaint B schedule

property and second respondent is his son-in-law and there is no pathway through any portion of plaint B schedule property and respondents and other persons in the locality have convenient pathway for reaching the public pathway and they are not using any portion of plaint B schedule property and in 1977 plaintiff constructed a compound wall on the eastern, western and northern boundaries of the property and walls were constructed so as to touch the property of Jayasimhan and since the property of Jayasimhan was on a higher level, no wall was constructed on northern side and on north eastern wall of plaint schedule property there is a gate for the use of plaintiff and plaintiff had to file O.S.8/1977 before Munsiff court, Varkala to evict a tenant who was in possession of the property and defendants are associates of the tenant and hence on inimical terms with plaintiff and in 1981 they attempted to cut open a new pathway through plaint B schedule property which was obstructed by plaintiff and there was a criminal case before Judicial First Class Magistrate court, Varkala in respect of the incident and respondents prevented plaintiff from reconstructing the wall demolished by them and they filed a complaint before

R.D.O, Thiruvananthapuram and O.P.1414/1983 was filed by plaintiff challenging that order before this court and this court directed the dispute to be decided by the civil court and therefore suit is filed. Plaintiff contended that he has title and possession to plaint B schedule property and respondents are to be restrained from trespassing into the property or from causing any obstruction in reconstructing the demolished wall. Defendants in the written statement contended that there is a pathway in between plaint B schedule property and property of Jayasimhan and plaintiff has no right over that pathway and there is a panchayat road proceeding to the railway station and about 10 feet north to plaint B schedule property there is a public pathway having a width of 6 feet and it ends at the middle of plaint B schedule property and thereafter proceeds to the east and plaintiff constructed a gate about 6 feet south to that pathway and that pathway proceeds further to west through southern side of the property of Jayasimhan and through north eastern corner of defendants property and it proceeds towards south and then to west and reaches Irangukayikara kadavu and that pathway was used by defendants and other neighbours as well as public for

more than 40 years as of right and without interruption. It was also is contended that respondents have a right of way by easement of prescription and there is no other way except the way through plaint B schedule property and therefore they have a right of way by easement of necessity also and plaintiff is not entitled to the decree sought for.

2. Learned Munsiff on the evidence of Pws.1 to 4, Dws.1 to 4, Exts.A1 to A8, B1 to B3 and C1 to C2(a) upheld the case of respondents that they have a right of way through plaint B schedule property and granted a decree subject to the right of way available to respondents over plot ABHI, as marked by the Commissioner in Ext.C2(a) plan. A decree declaring title and possession of plaintiff to plaint B schedule property which is marked as plot ABCDEFG in Ext.C1(a) plan subject to the right of way available to respondents over plot ABHI marked in that plan was granted. Plaintiff challenged the decree and judgment before Sub court, Attingal in A.S.70/1984. Learned Sub Judge set aside the decree and remanded the suit to the trial court granting opportunity to plaintiff to amend the plaint showing the details of the alternate way available to defendants and

also the route through which it passes and directing trial court to issue a Commission to ascertain whether the alternative pathway is available. Thereafter trial court appointed another commission who submitted Ext.C2 report and C2(a) plan. PW2 was recalled and examined. Learned Munsiff on that evidence again granted a decree in favour of plaintiff subject to the right of way over plot ABHI. Plaintiff challenged the decree and judgment before Sub court, Attingal in A.S.98/1987. Learned Sub Judge on re-appreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Appeal was admitted formulating the following substantial questions of law.

> 1) Having found that plaintiff has title and same was not lost by adverse possession and limitation whether courts below were right in refusing the right to reconstruct the wall.
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> 2) Having found that there is an alternative pathway whether courts below were right in holding that defendants are entitled to a right of way through plaint B schedule property.

4. Learned counsel appearing for appellant and

respondents heard.

5. On hearing the learned counsel it is found that substantial questions of law, as formulated, are not involve in the second appeal. Even if appellant has title to plaint B schedule property, if respondents have a right of way, appellant is not entitled to a decree for reconstruction of the compound wall and thereby obstruct the right of way available. So also, if defendants have a right of way by easement of prescription, availability of an alternate way will not destroy the said right. Hence these are not a substantials question of law. On the submission made by the counsel on either side it is clear that the following substantial question of law is involved. It is therefore formulated as follows.

> Whether without pleading and proving the ingredients of right of easement by prescription, defendants are entitled to a right of way through plaint B schedule property as granted by courts below.

6. Right, title and possession of appellant over plaint B schedule property is not disputed. Only dispute is regarding the right of way claimed by respondents. Right of way upheld by the trial court was easement by

prescription. Though right of easement by necessity was claimed, admittedly there was no splitting up of the tenement which would entitle respondents to claim a right of easement by necessity. Therefore, even if it is taken that there is no other way available to respondents, as there was no joint tenement and subsequent severance respondents are not entitled to claim a right of easement by necessity.

7. First appellate court though upheld right of way found by trial court did not elaborately consider the question whether ingredients of right of easement by prescription was established or not. Argument of learned counsel appearing for appellant is that in the written statement itself ingredients of easement by prescription was not pleaded and though DW4, son-in-law of first defendant was examined, it was admitted by DW4 that he married daughter of first defendant only on 1977 and first defendant purchased his property only in 1968 and therefore, even if it is taken that first defendant has been using plaint B schedule property as a way from 1968, as suit was filed in 1983, period of 20 years will not expire from that day and first defendant cannot claim a right by easement of prescription. Second

defendant is not having any right over the property and he is the son-in-law of first defendant. It was pointed out that in the written statement itself what was contended was that defendants, their neighbours and people of the locality have been using the way for 40 years and there was no case that predecessor interest of first defendant was using plaint B schedule property as a way and in continuation of that right first defendant also has been using the way and therefore a right of way has been prescribed. Learned counsel appearing for respondents argued that pleading has to be read as a whole and if so read what was contended by defendants was that disputed way was being used by defendants, neighbours and the public of the locality and it has been used as a way for the last 45 years and it implies that predecessor in interest of first defendant was also using it and therefore there is necessary pleading on the claim for easement by prescription.

8. Written statement of defendants shows that in paragraph 15 it was pleaded that about 100 feet to the north of plaint B schedule property, there is a panchayat road leading to railway station and from that road a public way starts which is having a width of 6 feet and

it runs through the northern boundary of plaint B schedule property up to the middle and thereafter it turns to the east and at that place, way is having a width of 4 feet and they said way proceeds further and reaches to the north eastern corner of the property of respondents. In paragraph 16 relevant pleadings regarding the right of way is raised. Pleading is that the said way is being used by owners of neighbouring property and public and defendants for the last 40 years continuously, openly and without interruption said right of way was used hostile to plaintiff and the persons residing on eastern side of the property of defendants are also using the said way. In paragraph No.17 it was pleaded that defendants and public have a right of way by easement of prescription and right of plaintiff over that property was lost by adverse possession. This is all that was pleaded in the written statement with regard to the right of way. In paragraph 18 it was further contended that apart from said way defendants have no other way and therefore they have a right of easement by necessity. These are the only pleadings seen in the written statement with regard to the right of way. Therefore, right of way claimed is an easement of

prescription and easement of necessity. In addition, it was contended that it is a public way. Courts below on the evidence found that the disputed way is not a public way. Though DW1 President of panchayat and DW3 former member of the panchayat deposed that disputed way was being used by public, their evidence is insufficient to prove that it is a public way. Therefore, respondents can get a right of way only if they have established a right of easement by prescription.

9. As rightly pointed out by learned counsel appearing for appellant, if respondents have to get a right of easement by prescription, it is to be pleaded that first defendant or predecessor from whom first defendant purchased property, have been using plaint B schedule property as a way openly, peaceably and uninterruptedly and as of right and as easement for 20 years before institution of the suit. Though it was pleaded that the way was in existence and was used by public for the last 40 years, there was no pleading that predecessor in interest of first defendant was using this way as of right and as an easement and first defendant continued it so as to get a right of easement by prescription. Defendants did not produce their title deed

by which first defendant obtained his property. He did not examine her assignor also. Therefore, the only evidence available is that of DW4. Evidence of DW4 establish that first defendant obtained property only in 1968. There is no pleading and no evidence that the assignor of first defendant was using the disputed way as of right and as an easement prior to the sale deed executed in favour of first defendant. Therefore, there is absence of pleading and proof with regard to the mandatory ingredient to uphold the plea of easement by prescription. Unfortunately, this aspect was not taken note of by the trial court. First appellate court did not attempt to consider the ingredients at all. On the evidence it can only be held that defendants did not establish a right of way by easement of prescription, through plaint B schedule property and respondents are not entitled to a right of way as found by the trial court and confirmed by first appellate court. As title and possession of appellant over plaint B schedule property is established, courts below should have granted a decree in respect of plaint B schedule property, without reserving any right of way to respondents.

10. In the result, appeal is allowed. Decree and

judgment passed in O.S.52/1983 on the file of Munsiff court, Varkala as confirmed by Sub Judge in A.S.98/1987 is modified as follows. Appellant/plaintiff is entitled to a decree declaring his title and possession of plaint B schedule property marked as plot ABCDEFG in Ext.C1(a) plan. Respondents are restrained from trespassing into plaint B schedule property or making use of plaint B schedule property as a way. No cost.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.398 OF 1994

11th October 2007

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